U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF IT&E-C-S-, INC.

DATE: JUNE 10, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an advanced software development and consulting business seeks to employ the Beneficiary as a senior real time programmer analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Nebraska Service Center, denied the petition. The Director determined that the Beneficiary did not possess a U.S. degree as required by the terms of the labor certification.

The matter is now before us on appeal. The Petitioner asserts that its indication on the labor certification that it would not accept a foreign educational equivalent was an immaterial typographical error that should be corrected by U.S. Citizenship and Immigration Services (USCIS). Upon *de novo* review, we will dismiss the appeal.

I. LAW AND ANALYSIS

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Next, USCIS must approve an immigrant visa petition. *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, the foreign national must apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the DOL, accompanies the instant petition. By approving the labor certification, the DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the employment of a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(II).

In these visa petition proceedings, USCIS determines whether a foreign national meets the job requirements specified on a labor certification and the requirements of the requested immigrant classification. *See* section 204(b) of the Act (stating that USCIS must approve a petition if the facts stated in it are true and the foreign national is eligible for the requested preference classification); *see also, e.g., Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983) (both holding that the immigration service has authority to make preference classification decisions).

The priority date of this petition, which is the date the DOL accepted the labor certification for processing, is March 5, 2015.[1] *See* 8 C.F.R. § 204.5(d).

A. Minimum Requirements of the Labor Certification

Part H of the instant labor certification states that the offered position has the following minimum requirements:

H.4. Education: Bachelor's degree in computer science, engineering (any), technology or related.
. . .
H.6. Experience in the job offered: 60 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Not accepted.
H.10. Experience in an alternate occupation: 60 months as an assistant project manager, programmer analyst, IT analyst, systems analyst.
H.14. Specific skills or other requirements: Any suitable combination of education, training or experience is acceptable. Travel to client sites throughout the U.S.

The Petitioner asserts that its indication on the labor certification that it would not accept a foreign educational equivalent was an immaterial typographical error. The Petitioner states that the typographical error was obvious at the time of filing because the Beneficiary's foreign education is listed on the labor certification. Citing to *Ben Pumo*, 2009-PER-00040 (BALCA 2009) and *Matter of Nancy Adelman*, 2011-PER-02464 (BALCA 2011), the Petitioner states that, as with the instant case, immaterial errors would not result in denial of a labor certification.

The Petitioner does not state how DOL precedent is binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, Board of Alien Labor Certification Appeals (BALCA) decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Even considering BALCA cases, *Ben Pumo* and *Matter of Nancy Adelman* are distinguishable from the facts of the instant petition. The employers in these cases

[1] The priority date is used to calculate when the beneficiary of the visa petition is eligible to adjust his or her status to that of a lawful permanent resident. *See* 8 C.F.R. § 245.1(g).

requested reconsideration of labor certification applications that had been denied based on immaterial typographical errors. The requests to disregard typographical errors were made before the DOL. Here, USCIS is determining whether the Beneficiary meets the minimum requirements of the labor certification which has already been certified by DOL. BALCA has previously held that once a labor certification has been certified, whether to allow an amendment such as the one requested by the instant Petitioner is solely within the certifying officer's discretion. *See General Electric Company (GE Consumer & Industrial)*, 2011-PER-01818 (BALCA 2014). 20 C.F.R. § 656.11(b) prohibits an employer from modifying the labor certification and DOL has set forth procedures for correcting errors after an application has been denied or withdrawn. *See Permanent Labor Certification Frequently Asked Questions: Appeals* and *Permanent Labor Certification Program Final Regulation Frequently Asked Questions*, DOL, www.foreignlaborcert.doleta.gov (accessed May 19, 2016).

It is DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656; *Madany* at 1012-1013; *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983); and *Tongatapu* at 1309. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification. *Id.* In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also*, *Madany* at 1008; *K.R.K. Irvine* at 1006; and *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The Petitioner asserts that by stating in H.14 that "any suitable combination of education, training or experience is acceptable," it provided notice of the position's actual minimum requirements, specifically, that a foreign educational equivalent was acceptable. However, the plain language of "any suitable combination of education, training, or experience" in section H.14 does not alter the Petitioner's indication in section H.9 that a foreign educational equivalent is not acceptable. *Madany*, 696 F.2d at 1015; *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833-834 (D.D.C. 1984). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

On appeal, the Petitioner's counsel asserts that the Petitioner intended to accept a foreign equivalent degree. However, the assertions of counsel do not constitute probative evidence and the record of proceedings does not contain independent evidence to substantiate the claim that a foreign educational equivalent was accepted. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988). The record of proceedings does not include a copy of the signed recruitment report, copies of the recruitment conducted for the position, the job order, the posted notice of the filing of the labor certification, or any resumes received in response to the

recruitment efforts. Nor does the record include any statement from the Petitioner regarding its intentions or evidence of the Petitioner's actual minimum requirements for the proffered job.

Finally, the Petitioner asserts that it would conflict with the basic notion of fundamental fairness to retroactively deprive it from correcting a typographical error on its certified labor certification when it would have been permitted to correct the typographical error on appeal before BALCA or through re-filing while the recruitment remained valid. However, the Petitioner does not cite any law, regulation or precedent which would permit us to make changes to the requirements of a labor certification already certified by the DOL.

Therefore, the Petitioner has not established that the minimum requirements of the proffered job, as defined by the terms of the labor certification, include a foreign educational equivalent degree.

B. Beneficiary Qualifications

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(1), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(g)(1). If such evidence is unavailable, USCIS may consider other documentation relating to the beneficiary's experience. *Id.*

The record of proceedings contains the Beneficiary's bachelor of technology in electronics and communications engineering diploma and transcripts from [redacted] India, issued on September 7, 2007, which is equivalent to a bachelor's degree in the United States. However, the terms of the labor certification require a U.S. bachelor's degree in computer science, engineering (any), technology or related and state that a foreign equivalent degree is not acceptable. The labor certification does not permit a foreign equivalent degree such as that possessed by the Beneficiary.

Although not discussed by the Director, we independently note that the record does not demonstrate that the Beneficiary possessed the required 5 years of experience for the offered position. Part K of the labor certification states that the Beneficiary possesses employment experience as:

- An assistant project manager with [redacted] (formerly [redacted] Massachusetts, from November 6, 2006 to October 31, 2013.
- A programmer analyst with the Petitioner from November 1, 2013, to March 5, 2015, the date on which the labor certification was submitted.

The labor certification lists no other employment and was signed under penalty of perjury.

The record contains evidence of the Beneficiary's claimed experience with (formerly A March 14, 2013, letter from associate director-human resources, on Massachusetts, letterhead, advises that the Beneficiary has been employed as an assistant project manager since September 26, 2011, and deputed to a client location in New York. states that prior to this employment, the Beneficiary had worked in the company's Indian offices since November 2006 but provides no description of the Beneficiary's job duties.

A November 3, 2015, letter from senior associate-human resources, on Massachusetts, letterhead provides the details of the Beneficiary's duties as a senior software engineer, team lead and an assistant project manager with the company from March 22, 2010 to September 31, 2013. While the Petitioner has established that the Beneficiary gained approximately 3.5 years of qualifying experience with from March 22, 2010 to September 31, 2013, the record of proceedings does not contain sufficient evidence of the Beneficiary's employment with prior to March 22, 2010.

The record, therefore, does not establish that the Beneficiary possessed a U.S. bachelor's degree in computer science, engineering (any), technology or related and 5 years of experience in the proffered position or as an assistant project manager, programmer analyst, IT analyst or systems analyst.

B. Ability to Pay Proffered Wage

Although not addressed by the Director, we independently note that the record does not establish that the Petitioner has the ability to pay the proffered wage from the priority date onwards.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). Where a petitioner has filed multiple petitions, we will also consider the petitioner's ability to pay the combined wages of

each beneficiary. *See Patel v. Johnson*, 2 F.Supp.3d 108 (D. Mass. 2014); *see also Great Wall* at 144-145. The proffered wage is $117,811 per year and the priority date is March 5, 2015.

The record does not contain the Petitioner's annual reports, federal tax returns or audited financial statements for 2015, the year of the priority date.

Additionally, USCIS records indicate that the Petitioner has filed at least 12 Form I-140 immigrant petitions on behalf of other immigrant beneficiaries which were pending or approved from the instant priority date onwards. In determining whether a petitioner has established its ability to pay the proffered wage to multiple beneficiaries, USCIS will add together the proffered wages for each beneficiary for each year starting from the priority date of the instant petition.[2]

In any future filings, the Petitioner must submit its annual reports, federal tax returns or audited financial statements for 2015, if available, and any Forms W-2 or 1099 issued to the Beneficiary for 2015. The Petitioner must also submit information for each beneficiary on whose behalf it has filed a Form I-140, including the priority date, the proffered wage, and the actual wages paid for each petition.

C. Actual Employer

We also note that it is unclear that the Petitioner will be the Beneficiary's actual employer. The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(3) of the Act." In addition, the DOL regulation at 20 C.F.R. § 656.3 states:

> *Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

The Petitioner's website indicates that its services include placement services and "offers permanent, contract to hire and short term contract staff augmentation." *See Our Services*, [redacted] (accessed May 12, 2016). Therefore, it is unclear whether the Petitioner has a *bona fide* job offer to the Beneficiary for the proffered position or whether the Petitioner intends to place the Beneficiary in a permanent or short term position with another employer. The record of proceedings contains insufficient evidence of a permanent position available to the Beneficiary as an employee with the Petitioner. This issue should be addressed with any further filings.

[2] However, the wages offered to the other beneficiaries are not considered after the dates the beneficiaries obtained lawful permanent residence, or after the dates their Form I-140 petitions have been withdrawn, revoked, or denied without a pending appeal. In addition, USCIS will not consider a petitioner's ability to pay additional beneficiaries for each year that the beneficiary of the instant petition was paid the full proffered wage.

II. CONCLUSION

In summary, the Petitioner did not establish that the Beneficiary meets the minimum requirements of the labor certification. The Director's decision denying the petition is affirmed. The record also does not establish that the Petitioner has the ability to pay the proffered wage from the priority date onwards or that there is a *bona fide* job offer with its organization.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of IT&E-C-S-, Inc.*, ID# 17459 (AAO June 10, 2016)